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Comment

INFLAMMATORY PUBLICITY IN STATE
CRIMINAL CASES

I. INTRODUCTION

In *State v. Van Duyne*,¹ the Supreme Court of New Jersey reviewed the conviction of a construction worker for the brutal murder of his wife. The defendant contended, *inter alia*, that his motion for mistrial should have been granted because of improper and prejudicial stories which appeared in local newspapers while the jury was being empaneled.² In affirming the conviction, the court noted that it had examined the record of the trial and was unable to find evidence that the newspaper articles "prevented a fair trial or that they so infected the minds of some of the jurors as to leave them biased against the defendant."³ Nevertheless, the court issued a strong and definitive warning to those connected with the administration of criminal justice, particularly attorneys, on the subject of "trial by newspaper."⁴ The statement of the court relies on the American Bar Association Canons of Professional Ethics:⁵

¹ 43 N.J. 369, 204 A.2d 841 (1964).

² One such article stated that "Van Duyne was nabbed in a phone booth by police a short time later. Police quoted him as saying, 'You've got me for murder. I don't desire to tell you anything.'" Another article said: "According to police, Van Duyne had been arrested at least 10 times and had once threatened to 'kill a cop.' Authorities reported after his arrest that Van Duyne beat up a man during the summer in 1962 and then threatened Detective William Toomey with a gun." None of these statements was ever proved at trial. *Id.* at 384, 204 A.2d at 849.

³ *Id.* at 386, 204 A.2d at 851.

⁴ For want of a better or more concise term, "trial by newspaper" will be used often in this article and when used will refer to all news media, not merely to the press. The material to which the term refers includes publication of alleged confessions of the accused, past criminal record of the accused, failure of a person to take a lie detector test, statements of unsworn witnesses, statements dealing with tangible evidence in the case, opinions of the guilt or innocence of the accused, and any other inflammatory material, whether or not it is actually prejudicial.

⁵ Canon 20, A.B.A. Canons of Professional Ethics, states: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte*

We interpret these canons, particularly *Canon 20*, to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is "open and shut" against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such statements have the capacity to interfere with a fair trial and cannot be countenanced. With respect to prosecutors' detectives and members of local police departments who are not members of the bar, statements of the type described are an improper interference with the due administration of criminal justice and constitute conduct unbecoming a police officer. As such they warrant discipline at the hands of the proper authorities.

The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence.⁶

In view of the existence of *Canon 20*, the statement of the New Jersey Supreme Court should not appear to be extraordinary. However, it apparently is the first such statement by any court of record in this country;⁷ the first indication that at last a court intends to take an obvious step toward eliminating prejudicial publicity in state criminal proceedings by enforcing *Canon 20*.

Much has been written about the evils of, and solutions to, the problem of trial by newspaper. It is not the purpose of this article to attempt an exhaustive exposition of all that has been said before, but rather to summarize the problem, to examine the past approaches to its solution, and then to discuss the relative merits of proposed new solutions, such as: (1) amendment and/or enforcement of *Canon 20*; (2) adoption by the news media of enforceable codes of ethics; and (3) adoption of criminal legislation which would punish divulgence or publication of prejudicial material.⁸ All of these take on added significance in view of the

reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

⁶ 43 N.J. 369, 389, 204 A.2d 841, 852 (1964).

⁷ It has also been stated that there is no record of a case in which disciplinary action has been taken against an attorney for acts amounting to a violation of *Canon 20*. BLAUSTEIN & PORTER, *THE AMERICAN LAWYER* 271 (1954).

⁸ No attempt is made in this article to deal with special problems arising from news media coverage of the trial itself, e.g., whether to allow photographers and television cameras in the courtroom or whether the press has a "right" to attend all trials. For discussion of these problems, see Freedman, *News Media Coverage of Criminal Cases and*

Van Duyne decision and the recent report of the Warren Commission.

II. THE PROBLEM

A. FACTUAL ASPECTS

The *Van Duyne* case aptly illustrates the factual aspects of the problem of out-of-court statements and publications surrounding criminal proceedings.⁹ If such statements and publications were uncommon, they probably would evoke little more than casual comment by the judiciary. Unfortunately, they are not unusual and may be found in news media reports in all parts of the country.¹⁰ As Mr. Justice Frankfurter lamented, "Not a Term passes without this Court being importuned to review convictions . . . because of inflammatory newspaper accounts"¹¹ It would be unnecessary and perhaps futile to attempt enumeration or discussion of the many cases surrounded by publicity similar to that in *Van Duyne*.¹² All authorities seem to agree that numerous criminal trials are conducted amid news media reports of statements made out of court regarding alleged confessions of the accused,¹³ the accused's past criminal record,¹⁴ failure of a suspect to take a lie detector test,¹⁵ statements by unsworn witnesses,¹⁶ and editorial comments as to the guilt or innocence of a defendant.¹⁷

the Right to a Fair Trial, 40 NEB. L. REV. 391 (1961); Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125 (1964). See also FED. R. CRIM. P. 53; Canon 35, A.B.A. Canons of Professional Ethics.

⁹ See note 2 *supra*.

¹⁰ See, e.g., *Lincoln Star*, Dec. 29, 1964, p. 11, cols. 5-6, containing an article about an accused murderer and stating that the accused had orally admitted the killings to the prosecutor, that there was evidence of drinking prior to the killings, and that the accused had been hospitalized several times for alcoholism and arrested for intoxication.

¹¹ *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (concurring opinion).

¹² For a discussion of several cases where publicity reached a particularly high level, see SULLIVAN, *TRIAL BY NEWSPAPER* (1961).

¹³ *Rideau v. Louisiana*, 373 U.S. 723 (1963) (film of defendant confessing to sheriff shown on television); *Stroble v. California*, 343 U.S. 181 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951).

¹⁴ *Marshall v. United States*, 360 U.S. 310 (1959); *State v. Van Duyne*, 43 N.J. 369, 204 A.2d 841 (1964).

¹⁵ *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956).

¹⁶ *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁷ *Bridges v. California*, 314 U.S. 252 (1941).

B. THE EVIL INVOLVED

Unfortunately, at the time of this writing, there appear to be no conclusive reports based upon scientific evidence which indicate the exact nature of the evil resulting from news media reporting of the type under consideration. As a result, differences of opinion exist as to what kind of evil does result,¹⁸ or whether any evil at all results.¹⁹ The latter view is a minority one, and with regard to the nature of the evil it is sufficient to say that there is ample evidence that the fairness and impartiality of a trial are often threatened.²⁰ An excellent example is *Irvin v. Dowd*,²¹ where pretrial publicity was so intensive and prejudicial that ninety per cent of the prospective jurors had formed some opinion as to the guilt of the defendant.

Further evidence is found in the fact that certain kinds of information, such as coerced confessions, past criminal records,

¹⁸ See PHILLIPS & MCCOY, *CONDUCT OF JUDGES AND LAWYERS* 164 (1952), where the authors report that two out of three lawyers polled believed that publicity occasioned by the failure of lawyers to observe Canon 20 "has lessened the confidence of the public in the integrity and impartiality of the administration of justice" Another view is presented in Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 21 (1961), where it is said: "Naturally it would be absurd to attribute the oft-mentioned decline of moral ideals in America—a phenomenon yet to be scientifically demonstrated—or even the rising crime rate to the sole force of crime publicity. But a nexus strongly suggests itself. Moreover, the effect may be not merely a blunting of the communal conscience, but an outright perversion."

¹⁹ See, e.g., Wiggins, *The Press and Conflicts of Interest*, 24 FED. B.J. 358, 361 (1964): "The whole process . . . requires more scrutiny rather than less, more publicity rather than more secrecy." The author gives as reasons for his statement the improvement in quality and quantity of testimony given, increased consciousness by public officials of their duties, protection of lawyers and judges from unjust accusations, and education of the public, all of which should not be sacrificed for the sake of "perfect fairness" in trials. However, the author fails to show how *prejudicial* publications advance any of these supposed benefits.

An office memorandum, circulated by Col. Robert R. McCormick, Editor of the *Chicago Tribune*, and quoted in 38 VA. L. REV. 1057, 1070-71 (1952), says: "For every case where newspaper reporting and editorial comment may have prejudiced a defendant's rights, there are thousands of cases to prove that a free press, directed by no other 'code' than its good conscience, has protected not only individual defendants, but society as a whole."

²⁰ U.S. CONST. amend. VI, gives the defendant the right to a trial by an impartial jury.

²¹ 366 U.S. 717 (1961).

and failures to take lie detector tests have generally been held to be inadmissible as evidence at trial.²² Publication of this information undermines the judicial process in two ways. First, it exposes prospective jurors to inadmissible evidence. Second, it destroys one of the functions of the bar in criminal cases, since "neither counsel nor court can control the admission of evidence if unproven, and probably unprovable 'confessions' are put before the jury by newspapers and radio."²³ In addition, inflammatory publicity may cause unnecessary delay in selecting jurors and proceeding with the case.²⁴

The least that may be said about the publication of sensational material and inadmissible or not-yet-admitted evidence is that it does not aid the administration of justice. If the public has a right to be apprised of criminal activity, this right can certainly be fulfilled by statements that a specific crime has been committed, that a suspect is being sought, and that a certain person has been arrested or charged with the crime. On the other hand, sensational publicity has caused serious problems of unfairness in the past, and there is no reason to believe that it will not cause similar problems in the future. On that basis alone, concern for the evil involved is warranted.

C. THE ISSUES

Most authors have characterized the problem of inflammatory publicity in terms of conflicting constitutional rights—the right to a fair trial²⁵ pitted against the freedom of the press.²⁶ While there is some dissent as to whether this conflict constitutes the totality of the issue,²⁷ it is generally agreed that the conflict does

²² "Long generations of experience in the criminal law have convinced us that these things are bad evidence—worse than useless—because their inflammatory effect is far greater than their contribution to the quest for truth. Thus, our law refuses to admit them in evidence" Wright, *supra* note 8, at 1125.

²³ *Shepherd v. Florida*, 341 U.S. 50, 52 (1951).

²⁴ 38 VA. L. REV. 1057, 1058 (1952).

²⁵ See note 20 *supra*.

²⁶ U.S. CONST. amend. I.

²⁷ Mueller, *supra* note 18, at 2. The author says the clash is between the right of the citizen to complete and intelligent information and the right to be free from detriment through crime. Wright also speaks of the "right to know." Wright, *supra* note 8. For an interesting article dispelling the "right to know" argument, see Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 201-04 (1963).

exist and is an important part of the issue.²⁸ As Judge Holtzoff said:

In order to guarantee an absolutely fair trial it would be necessary to eliminate completely any such publicity. On the other hand, it may be argued that to compel its exclusion might constitute an infringement on freedom of the press. The question is where to draw the true line.²⁹

The problem is not only *where* to draw the line, but *how* to draw it. Both aspects are discussed in the following section.

III. ANALYSIS OF PAST AND PRESENT SOLUTIONS

A. THE PROCEDURAL SAFEGUARDS

In nearly all jurisdictions, there exist certain procedural safeguards used to overcome the effects of trial by newspaper. These safeguards probably have some remedial effect in certain situations. Nevertheless, it may be demonstrated that in many cases the safeguards have little effect, and if they do succeed in part, they cause other undesirable results.

(1) *Change of Venue*

The theory of change of venue is that removal of a trial from the locality of the crime will produce greater objectivity and fairness. However, change of venue may delay the trial unnecessarily, cause extra expense to the state or defense, and inconvenience all parties connected with the trial.³⁰ If venue is changed to a place distant enough to relieve the effects of massive publicity, the scene of the crime will probably be out of the reach of the court during the trial, thereby making it impossible for the judge and jury to view the scene when this would be desirable.³¹ Since in many cases only one change of venue may be granted³² and the

²⁸ The right to a fair trial, as set forth in the sixth amendment, includes the right to a speedy trial, an impartial trial, and a public trial. There has been much discussion of whether the right to a public trial is a right reserved to the defendant, which may be waived by him if he so desires, or a right of the public to witness criminal trials under all circumstances. The cases on record have gone both ways. See Freedman, *supra* note 8, at 398.

²⁹ Holtzoff, *Opening Remarks of Moderator to Panel Discussion on Fair Trial and Freedom of the Press*, 19 F.R.D. 16, 18 (1957).

³⁰ Note, 63 HARV. L. REV. 840, 844 (1950).

³¹ Gelb, *Fair Trials and Free Speech*, 31 GEO. WASH. L. REV. 607, 612 (1963).

³² *Irvin v. Dowd*, 366 U.S. 717 (1961).

trial judge may be limited in his discretion in selecting a new place for the trial,³³ change of venue may have little effect on prejudicial publicity. Finally, it is questionable whether even unlimited change of venue would solve the problem because of state-wide and nation-wide news media which could make it impossible for a fair trial to be held anywhere in the country.³⁴

(2) Continuance

The continuance, or postponement of trial, is supposed to allow a "cooling-off period" during which publicity diminishes and public sentiment subsides, thereby creating a climate more suitable for conducting a fair trial. Aside from the fact that a continuance may be difficult to obtain,³⁵ other inadequacies are apparent. Continuance requires both prosecution and defense to preserve evidence, to keep prospective witnesses within the jurisdiction, and to keep the testimony of witnesses clear in their minds.³⁶

The Constitution guarantees the defendant the right to both a speedy and impartial trial. If the defendant resorts to a motion for continuance, he has, in effect, waived his right to a speedy trial, though in cases involving trial by newspaper it can scarcely be said that he has waived this right without strong coercion.

In addition, the mere granting of a continuance is no assurance that prospective jurors will forget what has been written or

³³ See, e.g., NEB. REV. STAT. § 29-1301 (Reissue 1964): "All criminal cases shall be tried in the county where the offense was committed . . . unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in *some adjoining county*." (Emphasis added.)

³⁴ Nowhere has this fact been so well illustrated as in Dallas following the assassination of President Kennedy. Publicity was so intense and public feeling so aroused that had Lee Harvey Oswald ever come to trial, "it would have been a most difficult task to select an unprejudiced jury; either in Dallas or elsewhere." REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 238 (1964).

³⁵ Goldfarb, *Public Information, Criminal Trials, and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 819 (1961). In Nebraska, only the state is given a statutory privilege of asking for a continuance in criminal cases. This may be granted only where it is shown that material evidence exists which is presently unavailable to the state, but there is just ground to believe that the evidence will be available at the succeeding term. NEB. REV. STAT. § 29-1204 (Reissue 1964).

³⁶ Gelb, *supra* note 31, at 613.

broadcast, and even if they do forget, there is no assurance that a new wave of undesirable comment will not be forthcoming as the new trial date approaches.

(3) *Voir Dire*

Another safeguard is the *voir dire* examination, which involves excusing prospective jurors, either peremptorily or for cause.³⁷

The question arises as to what constitutes sufficient cause or prejudice to warrant a prospective juror's being excused. American courts have not imposed a standard of absolute impartiality. Exposure of a juror to prejudicial publicity, or even the disclosure of a preformed opinion, will not disqualify him if he believes he can put aside his prejudices and decide the case on the basis of the evidence presented.³⁸ This is not meant to imply that jurors dishonestly refuse to admit their prejudices on *voir dire*. Rather, the argument is that *voir dire* may be unable to discover the subconscious prejudices of which the juror himself is unaware.³⁹

So long as inflammatory publicity persists, any attempt to improve the effectiveness of *voir dire* by requiring absolute impartiality would be to set an "impossible standard"⁴⁰ and further inhibit the judicial process through delay in selecting jurors.

(4) *Reversal and Mistrial*

If publicity becomes so intense and prejudicial that a fair trial is impossible, the judge may declare a mistrial. Also, appellate courts may review convictions and reverse and remand them, if it is found that publicity caused an absence of due

³⁷ See, e.g., NEB. REV. STAT. § 29-2005 (Reissue 1964), which allows twelve peremptory challenges for the defense in a case involving the death sentence or life imprisonment, six in cases with sentences exceeding eighteen months, and three for all others. Peremptory challenges allowed to the prosecution are the same except for crimes punishable by life sentence or death, where only ten are allowed.

³⁸ "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). NEB. REV. STAT. § 29-2006 (Reissue 1964), provides that, if the preformed opinion of a juror is "founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay," the juror may be selected nonetheless, if he feels able to render an impartial verdict based on the evidence presented.

³⁹ Gelb, *supra* note 31, at 611-12.

⁴⁰ *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

process.⁴¹ Since the result of both these measures is to require a new trial, their effectiveness is compromised by some of the objections applicable to procedures already discussed—added expense, delay, inconvenience, and the difficulty of keeping evidence and witnesses fresh. In addition, another shortcoming is apparent. If a case is reversed on appeal because of a faulty ruling by the trial judge, or because of the conduct of attorneys prior to or during the trial, the reversal has the effect of penalizing the party who was in error and forcing him to do his work again.⁴² However, when a conviction is reversed because of prejudicial publicity there is no such sanction on the offending news media. The only result is that the news media have another trial to publicize. The penalty falls upon the defendant and the general public, who both lose their right to have criminal justice speedily and impartially administered. Such reversals are “an expedient and not a cure.”⁴³

B. CONSTRUCTIVE CONTEMPT BY PUBLICATION

(1) *The English Rule*

Much has been written of the power of English courts to punish newspapers for inflammatory and prejudicial reporting of criminal trials by citations for constructive contempt.⁴⁴ No attempt will be made here to discuss this power in detail. It is enough to acknowledge that the power does exist, and that it is based generally upon the famous words in *Roach v. Garvin*: “There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.”⁴⁵

⁴¹ For discussion of what constitutes an absence of due process, see discussion in II(C) *infra*.

⁴² Will, *supra* note 27, at 209-10.

⁴³ *State v. Van Dwyne*, 43 N.J. 369, 387, 204 A.2d 841, 851 (1964).

⁴⁴ The power of the courts to punish acts which are offensive to them is known as the contempt power. There are two categories of contempt—civil and criminal. Civil contempt involves disobedience to an express order of the court entered in a particular case. Criminal contempt involves acts which undermine the discipline and efficiency of judicial authority. Criminal contempt may be of two kinds: (1) direct contempt, which includes acts committed in the presence of the court; and (2) indirect or constructive contempt, which encompasses acts not committed in the presence of the court. Contemptuous news reporting of criminal cases is “contempt by publication,” a form of constructive contempt. Oliver, *Contempt by Publication*, 27 Mo. L. Rev. 171, 173-74 (1962).

⁴⁵ 2 Atk. 469, 471, 26 Eng. Rep. 683, 685 (Ch. 1752).

Since England has no unequivocal guarantee of freedom of speech and press comparable to our own, discussion of the success of the English rule would be only marginally helpful.⁴⁶

(2) *Contempt by Publication in the United States*

This century has seen a great change in the power of the courts to punish newspapers for contempt by publication. In 1918, the United States Supreme Court reviewed the conviction of a newspaper and its editor for contempt by publication.⁴⁷ The Court held that, in determining whether the contempt power could be used to override the freedom of the press, "the reasonable tendency of the acts done to influence or bring about the baleful result is the test."⁴⁸ Publications could be found to be contemptuous "without reference to the consideration of how far they may have been without influence in a particular case."⁴⁹ The "reasonable tendency" test was overruled in *Nye v. United States*.⁵⁰ Since *Nye* was a federal case, the decision raised questions as to the Court's attitude toward the constructive contempt power of state courts.

The questions did not remain unanswered for long. In *Bridges v. California*,⁵¹ the Court adopted the "clear and present danger" test and declared itself the final judge of what constituted a clear and present danger, which would be determined by examining the facts of each case.⁵² In *Pennekamp v. Florida*⁵³

⁴⁶ For two illuminating discussions of the constructive contempt power in England which reach different conclusions about its effectiveness and popularity, see Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935); Laski, *Procedure for Constructive Contempt in England*, 41 HARV. L. REV. 1031 (1928).

⁴⁷ *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918).

⁴⁸ *Id.* at 421.

⁴⁹ *Ibid.*

⁵⁰ 313 U.S. 33 (1941). The case involved an allegedly contemptuous act which took place one hundred miles from the court. It was held that § 268 of the Judicial Code, which authorized federal courts to punish as contempt any act "so near thereto as to obstruct the administration of justice," applied only to acts committed in the vicinity of the court and not to those which had a reasonable tendency to obstruct justice. *Id.* at 45 n.10.

⁵¹ 314 U.S. 252 (1941). This case involved an editorial denouncing two convicts who were up for probation and a published telegram criticizing a judge's decision.

⁵² "We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a

and *Craig v. Harney*,⁵⁴ the Court reiterated its position that a clear and present danger to the administration of justice, as determined by the Court itself, was the only circumstance in which a state court could foreclose the freedom of the press by punishing publications for constructive contempt.

The clear and present danger rule has greatly limited the power of state courts to punish constructive contempts by publication. First, the clear and present danger test is certainly more stringent than the reasonable tendency test. Second, the fact that the Supreme Court decides in each case whether a clear and present danger did exist leaves the trial judge with no established and precise standards upon which to base a contempt action. Third, even if constructive contempt convictions are upheld by the Court in some instances, the case-by-case approach provides little deterrent effect, since the news media are not put on adequate notice of exactly what is or is not a contemptuous publication.

Since the cases discussed did not involve juries, the question whether the Court will take a different approach to jury trials remains unanswered.⁵⁵ This question could have been resolved recently in the case of *Maryland v. Baltimore Radio Show, Inc.*,⁵⁶ but the Court denied certiorari. There is no reason to believe that a different test will be used in jury cases.⁵⁷ Perhaps the

likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." *Id.* at 271.

⁵³ 328 U.S. 331 (1946).

⁵⁴ 331 U.S. 367 (1947). In this case, the state appellate court applied the test enunciated in *Bridges* and determined that a clear and present danger did exist. The Supreme Court examined the record and reversed.

⁵⁵ See GOLDFARB, *THE CONTEMPT POWER* 98 (1963).

⁵⁶ 338 U.S. 912 (1950). Four radio stations were found guilty of contempt for broadcasting certain news dispatches relating to the accused in a murder case. The defendant in the murder trial elected to waive his right to a jury trial because of inflammatory publicity. In the contempt trial, the court found that the broadcasts had created an obstruction of justice by forcing defendant to waive jury trial. Had the Supreme Court granted certiorari, it would have been necessary to determine whether the broadcasts so prejudiced the prospective jurors as to warrant punishment for contempt.

⁵⁷ This is not to say that the Court will always maintain the clear and present danger test as the standard, but rather, that there is no reason to believe that it will apply different tests to judges and juries.

In *Dennis v. United States*, 341 U.S. 494 (1951), the Court said the test should be whether the gravity of the evil discounted by its im-

Court will be more likely to find, as a matter of fact, that a clear and present danger exists when justice is in the hands of twelve laymen than when it is administered by a judge. Even then, the deterrent effect of the contempt power will still be limited by the case-by-case approach.

C. THE UNITED STATES SUPREME COURT AND THE "FAIR TRIAL" RULE

The Supreme Court has been called upon several times to review state criminal convictions because of inflammatory publicity arising from out-of-court activities. The Court has based its decisions on the due process clause of the fourteenth amendment, which guarantees the defendant a fair trial. In *Stroble v. California*,⁵⁸ the Court affirmed the conviction because the defendant was unable to show either that particular jurors had been prejudiced or that newspaper stories had aroused such community prejudice as to necessarily prevent a fair trial. That the defendant had not attempted to use procedural safeguards, such as change of venue, was said to be significant but not dispositive.

probability justifies such invasion of free speech as is necessary to avoid the danger. This apparent adoption of a clear and *probable* danger test has been said to be a retreat from the clear and present danger test because it minimizes the requirement that the danger be immediate. Comment, 64 COLUM. L. REV. 81 (1964). Thus, it is possible that the clear and present danger test will not always obtain.

Some authors think that the words of Mr. Justice Frankfurter in his concurring opinion in *Irvin v. Dowd*, 366 U.S. 717 (1961), forecast expansion of the contempt power in jury cases. He said: "The court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade." While this implies that news media may be punished for prejudicial publications, it should be kept in mind that Mr. Justice Frankfurter long held such a view. He dissented in *Bridges* and *Craig* and concurred in *Pennekamp* only because he thought the inflammatory publicity came forth after the vital decisions of the trial judge had been made. In contrast, Mr. Justice Black has continually urged that criminal sanctions not be applied to the news media. *Justice Black and the First Amendment—"Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 569 (1962), in WESTIN, AN AUTOBIOGRAPHY OF THE SUPREME COURT 401, 407 (1963). Mr. Justice Douglas has proposed greater use of the procedural safeguards. Douglas, *Public Trial and Free Press*, 46 A.B.A.J. 840, 841 (1960). Mr. Justice Goldberg has suggested that self-restraint by news media would be most helpful. Goldberg, *Freedom and Responsibility of the Press*, in AMERICAN SOCIETY OF NEWSPAPER EDITORS, 1964 PROBLEMS OF JOURNALISM 50.

⁵⁸ 343 U.S. 181 (1952). The district attorney released details of a confession to the press.

In *Irvin v. Dowd*,⁵⁹ the defendant was granted one change of venue to an adjoining county, but additional motions for change of venue and continuance were denied. *Voir dire* revealed that ninety per cent of the prospective jurors had some opinion about the defendant's guilt. Eight of those selected had preformed opinions, but said they could lay them aside. The Court reversed because of the "pattern of deep and bitter prejudice" in the community, which was "clearly reflected in the sum total of the voir dire examination" and which caused the Court to give little weight to statements of impartiality by jurors.⁶⁰

The most liberal application of the fair trial rule appears in *Rideau v. Louisiana*.⁶¹ The Court reversed the conviction without seeking specific examples of prejudice or examining the *voir dire* transcript for evidence of a reflection of overwhelming public hostility. The majority held that due process required a jury to be drawn from a community of people who had not seen and heard defendant's televised confession.⁶²

What emerges from these cases is that the Court will reverse state convictions because of inflammatory publicity if: (1) there is a showing of actual prejudice among jurors which influenced the outcome of the trial; (2) there is sufficient evidence of overwhelming community hostility so as to rebut statements of impartiality by jurors;⁶³ or (3) publicity is so inflammatory that a conclusion of "unfairness" is mandatory.

Recently, the Court has held that, in state criminal cases, denial of the right to counsel⁶⁴ and the privilege against self-incrimination⁶⁵ are prejudicial per se. These decisions, coupled with the liberal holding in *Rideau*, may indicate that the Court is willing to declare certain kinds of publicity unfair per se, where

⁵⁹ 366 U.S. 717 (1961). The police and prosecutor released a statement saying the defendant had confessed. This and other statements about the defendant's past criminal record received wide publicity.

⁶⁰ *Id.* at 727.

⁶¹ 373 U.S. 723 (1963). A sound movie of the defendant confessing to the sheriff was shown on local television stations. A motion for change of venue was denied. Jurors who had seen the telecast were challenged for cause, but three of them were finally selected for the jury.

⁶² *Id.* at 727.

⁶³ What constitutes sufficient evidence is a question as yet not answered very precisely. See *Beck v. Washington*, 369 U.S. 541 (1962), where a showing of preformed opinion among slightly more than 25% of the prospective jurors was insufficient to reverse the conviction.

⁶⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶⁵ *Malloy v. Hogan*, 378 U.S. 1 (1964).

the defendant has attempted to use the procedural safeguards. Nevertheless, this step would not solve the problem, for the most that the fair trial rule can accomplish is a reversal, and the shortcomings of this procedure have been discussed previously.

IV. SOLUTIONS WHICH HAVE BEEN PROPOSED: COMPARATIVE ANALYSIS

A. AMENDMENT AND/OR ENFORCEMENT OF CANON 20

There can be little doubt that the bar must share the responsibility for trial by newspaper. An overwhelming majority of authors, including lawyers, judges, and newsmen, trace much prejudicial publicity directly to statements freely given to news media by lawyers for the parties involved.⁶⁶ This conclusion is reasonable in view of statements in the press that the accused has confessed, that the case is open and shut, or that the state does not have a shred of evidence. The content of such statements suggests that they are given by attorneys in the case.

One author has stated that it is futile to expect news media to place upon themselves voluntary restraints to which the bar itself is unwilling to conform. When attorneys in a case issue statements intended for digestion by the general public, it is unrealistic to expect reporters to scan the material, to decide what portions are legally inadmissible as evidence or legally prejudicial to the defendant, and to delete such portions from the published report.⁶⁷

The bar has a means of restraining its members from making prejudicial statements. However, from its somewhat casual inception⁶⁸ until the *Van Dwyne* decision, Canon 20 has been ineffective in solving the problem of trial by newspaper.⁶⁹ Perhaps part of the difficulty stems from the language of the canon itself, which says that comments by attorneys on pending litigation are "generally condemned" but may be made in "extreme

⁶⁶ See, e.g., PHILLIPS & MCCOY, *CONDUCT OF JUDGES AND LAWYERS* 179 (1952); Allen, *Fair Trial and Free Press*, 19 F.R.D. 36 (1957); Freedman, *News Media Coverage of Criminal Cases*, 40 NEB. L. REV. 391, 410 (1961); Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964); Pound, *Editorial Notes*, 3 ILL. L. REV. 231, 233-34 (1909).

⁶⁷ Wiggins, *The Press and Conflicts of Interests*, 24 FED. B.J. 358, 361 (1964).

⁶⁸ Canon 20 was adopted by separate motion without discussion. 33 A.B.A. REP. 85 (1908).

⁶⁹ See note 7 *supra*.

circumstances.”⁷⁰ This equivocal language has not been clarified by the Committee on Professional Ethics and Grievances.⁷¹ As a result, there have been several attempts to amend or clarify Canon 20 in the hope of setting forth more clearly the duties incumbent upon the members of the bar. The most definitive of these efforts is *State v. Van Dwyne*, where the court carefully delineated the various types of statements it considered banned by Canon 20.⁷² The New York State Bar Association has taken salutary action in adopting an amended Canon 20 which is more explicit than the present canon.⁷³ The Philadelphia Bar Association is now experimenting with a self-imposed plan of silence during criminal trials,⁷⁴ and the American Bar Association has taken action which may lead to amendment on a national scale.⁷⁵

⁷⁰ Roscoe Pound, commenting upon section 17 of the Alabama Code of Legal Ethics, upon which the present Canon 20 is based, said: “It is submitted that the provision of the Alabama code is insufficient to meet this rapidly-growing evil. . . . [I]t is to be hoped that provisions of the Code of the American Bar Association on this point will be unequivocal and vigorous.” Pound, *Editorial Notes*, 2 ILL. L. REV. 398, 401 (1908).

⁷¹ A.B.A. OP. 199 (1940) deals with Canon 20, but only with respect to statements emanating from the office of the United States Attorney General. It does not define the limits of comment. One author states that the failure of the committee to spell out Canon 20 indicates either that the language is so clear as to cause no problems in compliance or so narrow and ambiguous as to be unrealistic. He then adopts the latter conclusion. Note, 35 TEMP. L.Q. 412, 418-19 (1962).

⁷² See note 6 *supra* and accompanying text.

⁷³ The amended canon, quoted in Freedman, *News Media Coverage of Criminal Cases*, 40 NEB. L. REV. 391, 410 (1961), prohibits release to news media of any statement of opinion or alleged fact which is intended to or may interfere with a fair trial. The attorney has the right to reply to any public statement which adversely affects his client so long as the reply is factual and does no more than mitigate the effect of the prior statement. Other New York groups have advocated even more definitive action. The New York City Bar Association Committee on Bill of Rights has set forth areas of prohibited comment similar to those in *Van Dwyne*. This approach is quoted in TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY 199 (1957). The New York County Lawyer's Association has also advocated an amendment which explicitly states forbidden areas of comment. AMERICAN BAR FOUNDATION, MEMO NO. 33, FAIR TRIAL—FREE PRESS 19 (1964).

⁷⁴ Pompert, *Law and Press*, N.Y. Times, Jan. 10, 1965, § 4, p. 9, cols. 1-4 (city ed.).

⁷⁵ At the annual meeting in August, 1964, the House of Delegates approved a special committee to modernize the Canons of Ethics. One proposed amendment referred to the committee is designed to prohibit statements by attorneys about their opinions of the guilt or innocence of the defendant. Am. Bar News, Sept. 15, 1964, p. 4.

Even more important than amendment, however, is the enforcement of Canon 20. There is no doubt that the canons can be enforced, if the bar is willing to institute disciplinary proceedings.⁷⁶ It is also likely that the enforcement of Canon 20 need not be limited to cases in which statements by attorneys cause *actual* prejudice to the trial.⁷⁷

The advantages of using Canon 20 as a solution to the problem of trial by newspaper are obvious. First, this approach strikes at one of the principal sources of prejudicial information. Thus, the effect of enforcement should be to deter future violators, rather than only to remedy the immediate harm done by past violations. Second, the controversial issue of free speech and press is avoided. The news media will be unable to publish prejudicial material if their sources of information are silenced. While they have a constitutional freedom to publish nearly everything they know about a criminal case, there is no constitutional guarantee of access to information which attorneys choose not to disclose. Third, the enforcement of high standards by the bar will put the legal profession in a better position to persuade news media and police that they should adopt similar standards and will hopefully result in significant emulation. Fourth, and most idealistically, this approach is the most honorable, probably reflects the desires of a majority of the bar, and best illustrates the overall integrity of the profession.

B. SELF-RESTRAINT BY NEWS MEDIA

The suggestion that news media adopt rules for self-restraint is certainly not new, nor can it be said that no steps have been taken to develop such a plan. In 1923, the American Society of Newspaper Editors adopted Canons of Journalism.⁷⁸ Canons on "responsibility" and "decency" deal tangentially with trial by newspaper, but expressly recognize the lack of enforceability of the canons. These canons are still acknowledged by the Society of Editors,⁷⁹ but there is no record of their approval by the

⁷⁶ See e.g., *State ex rel. Nebraska Bar Ass'n v. Fisher*, 170 Neb. 483, 103 N.W.2d 325 (1960) (attorney suspended for tampering with evidence at trial in violation of Canons 15, 22, and 32); *State ex rel. Nebraska Bar Ass'n v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957) (attorney suspended for perpetration of fraud upon heirs in his capacity as administrator in violation of Canons 29, 11, and 12).

⁷⁷ *Ibid.* Both cases indicate that disbarment or suspension may result even though the conduct caused no actual damage.

⁷⁸ Otterbourg, *Fair Trial and Free Press*, 39 A.B.A.J. 978, 1022 (1953).

⁷⁹ The canons are printed each year in the organization's annual publi-

American Newspaper Publishers' Association.⁸⁰

In 1937, following the Lindbergh Kidnapping Case, a committee of six attorneys, seven publishers, and five editors was formed to study the problem of publicity interfering with the fair trial of judicial and quasi-judicial proceedings.⁸¹ The committee report contains an extensive list of suggestions for alleviating the problem. The committee was continued for another year and its next report recommended the establishment of a standing committee of the American Bar Association on cooperation between the bar and news media.⁸² It appears that no action was taken on the recommendation at that time.

These and other examples⁸³ illustrate that it is possible for the bar and the news media to confer and to agree on certain principles of reporting and commenting on criminal proceedings. In Massachusetts and Oregon, bar-press committees have been established and have developed tentative statements of principles governing the mutual responsibilities of lawyers and news media in reporting crime.⁸⁴ The remaining problem is to transform the written principles into standards of actual conduct.

Former United States District Judge Simon H. Rifkind has proposed that, after a code of conduct has been agreed upon, both the bar and the news media establish "watch-dog" committees to

cation, *Problems of Journalism*. See Goldberg, *Freedom and Responsibility of the Press*, in AMERICAN SOCIETY OF NEWSPAPER EDITORS, 1964 PROBLEMS OF JOURNALISM 50, where Mr. Justice Goldberg recommends that the canons be clarified and made more specific in order to help solve the problem of trial by newspaper.

⁸⁰ Otterbourg, *supra* note 78, at 1021.

⁸¹ Special Committee on Cooperation Between Press, Radio and Bar, *Report as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 A.B.A. REP. 851 (1937). Perhaps the failure of the suggestions to take root is attributable to the fact that many of them were tailor-made to fit the unusual happenings in the Lindbergh case and thus lacked universality. For instance, the committee suggested prohibitions on the taking of a popular referendum as to the guilt or innocence of the defendant and on vaudeville acts featuring jurors or court officers.

⁸² Special Committee on Cooperation Between Press, Radio and Bar, *Report as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 63 A.B.A. REP. 382 (1938).

⁸³ See Staff Report, *Fair Trial—Free Press Conference*, 10 BAR BULL. 170 (1953), for details of a conference held by the New York County Lawyer's Association in March, 1950.

⁸⁴ Wright, *A Formula of Voluntary Restraints Is Needed*, *The Quill*, Vol. 52, Feb., 1964, p. 9.

enforce the code through suggestion and moral persuasion.⁸⁵ Such an arrangement might be a significant step toward solving the problem.

Although much has been said of the inability of the news media to enforce any code of conduct which might be adopted, perhaps such inability should not be conceded without further study. While it is true that the news media may not enforce their ethical standards through the courts as does the bar, the news media are very much organization oriented. For example, the American Newspaper Publishers' Association is comprised of about five hundred leading publishers. The organization assists its members with problems of freight handling and mechanical efficiency, acts as the official representative in collective bargaining with labor unions, and maintains a collection service and information department for the sole benefit of its members.⁸⁶ Likewise, the American Society of Newspaper Editors has a membership of over five hundred and deals with current problems of editorship.⁸⁷ Assuming that these and other news media organizations are presently providing some benefit to their members, suspension of membership is a possible means of enforcing standards of conduct adopted by the organization. While such action might not have as strong an effect as disciplinary action by the bar, it would deprive offenders of organizational benefits and would evince a willingness to pay more than lip service to the adopted standards.

Self-restraint by the news media, in cooperation with the bar, should yield the same results as enforcement of Canon 20. Both are basically deterrent rather than remedial because they strike at the source rather than the effects of the problem. Both avoid the issue of free speech and press. Even though this solution may be difficult to implement, an attempt is necessary, for the alternatives are no more palatable. The *Van Duyne* case indicates that courts are becoming impatient with both press and bar and will not wait indefinitely for these groups to take action. In Judge Rifkind's words: "[I]f we do not experiment with a mild dose of self-regulation, we are bound to get a much more corrosive dose of legislation or judicial legislation."⁸⁸

⁸⁵ Rifkind, *Conflict Between Press and Justice*, 11 BAR BULL. 12, 17 (1953).

⁸⁶ 1 ENCYCLOPEDIA BRITANNICA 796 (1946).

⁸⁷ For membership list and examples of problems discussed, see AMERICAN SOCIETY OF NEWSPAPER EDITORS, 1964 PROBLEMS OF JOURNALISM.

⁸⁸ Rifkind, *supra* note 85, at 17.

C. CRIMINAL STATUTES

Proposals have been made recently for the adoption of criminal statutes to deal with the problem of trial by newspaper.⁸⁹ Essentially, these seek to punish the publication by news media, or the divulgence by those connected with law enforcement, of information which is prejudicial to a fair trial. Aside from minor criticisms,⁹⁰ the principal problem with these statutes is the inevitable confrontation of the constitutional rights of fair trial and free speech and press. Any criminal statute in this area would necessarily have to establish legislatively certain kinds of information which, if published or divulged, constitute a clear and present danger per se. However, as previously discussed,⁹¹ the Supreme Court has consistently held that it alone is the final judge of what constitutes a clear and present danger in a given situation. Even if the Court were to adopt a different test, there is little indication that it would be willing to allow a state legislature to determine what publications conform to the test.

It might be argued, by analogy to past rulings on obscenity, that inflammatory statements and publications are a special kind of speech not protected by the Constitution. However, the Court has already expressly rejected such an argument in *Bridges v. California*.⁹²

⁸⁹ See, e.g., Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 211 (1963); 57 NW. U.L. REV. 217, 250 (1962); 33 U.S.L. WEEK 2323-24 (1964).

⁹⁰ Generally, these statutes do not cover second or third trials arising out of the same criminal act, publicity during the period of appeal, or retrials of a reversed conviction.

In dealing with statutes which punish divulgence of prejudicial information, it should be noted that twelve states now have statutes granting to news media a privilege of nondisclosure of confidential news sources. In these states, the privilege statutes would have to be repealed, if proof of divulgence would be possible. See Note, 61 MICH. L. REV. 184 (1963).

Also, with regard to the past criminal record of the defendant, it is difficult to see how divulgence or publication could be punished, since this information is ordinarily available to anyone who is willing to search court records. Query: How can persons be punished for revealing to the public information to which the public already has access?

⁹¹ See notes 51-54 *supra* and accompanying text.

⁹² 314 U.S. 252 (1941). "History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." *Id.* at 268. In other words, inflammatory publicity is no different from other speech, and its sup-

The only indication that a statute punishing divulgence or publication might be upheld springs from a potentially paradoxical relationship between the fair trial rule and the clear and present danger test. If, as discussed earlier, the Court were to decide that under the fair trial rule certain kinds of publicity are incompatible with a fair trial per se, then it would be forced to alter its attitude toward the clear and present danger test. If it did not, there would arise an anomalous situation in which the Court could find, on the same set of facts, that publicity prevented a fair trial per se, but that the question of a clear and present danger was one of fact to be determined by the Court itself on the basis of all the circumstances. While this is an argument that the Court will allow statutes which classify certain kinds of speech or publication as per se a clear and present danger, it is an equally strong argument that the Court will avoid the anomaly by refusing to classify publicity of certain types as prejudicial per se under the fair trial rule. Since it is impossible to say that the same publicity: (1) was prejudicial per se; and (2) may not have created a clear and present danger to the administration of justice, it is more likely that the Court will decline to hold that material is prejudicial per se, in view of its past insistence on being the final judge of what constitutes clear and present danger.

Assuming, nevertheless, that a criminal statute could be passed which would meet constitutional standards and yet be comprehensive enough to deal with the problem, the statutory solution has one principal advantage over voluntary restraint. It could apply to police and private citizens not connected with law enforcement as well as to the press and bar. In this way, prejudicial statements and opinions of witnesses, friends and enemies of the defendant, and aroused citizens could be controlled.

V. CONCLUSION

All three of the proposed solutions have merit. All three seek to solve the problem of inflammatory publicity arising from out-of-court statements by directing their attention to the source of the problem—those who divulge and publish the information.

While the statutory method appears to be the quickest way to reduce the incidence of trial by newspaper, the constitutional difficulties which would be encountered tend to reduce its appeal. The voluntary, internal method of self-restraint by news media

pression or punishment must be judged by the same standards as other speech, such as the clear and present danger test.

and bar avoids the constitutional issue of fair trial versus free speech and press, but is undoubtedly more difficult to enforce.

In the final analysis, the ultimate choice of methods rests with the bar and news media. Failure on their part to solve their own problems could result in changes of attitude toward constitutional questions which would allow the adoption of criminal statutes. As the court stated in *Van Duyne*:

An answer to problems such as are presented here must be achieved. Fair criminal prosecution and exercise of the guaranty of a free press are not incompatible with the constitutional right of a defendant to a fair trial by an impartial jury. Only the will to recognize and to subscribe responsibly to the fact has been lacking.⁹³

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⁹³ State v. Van Duyne, 43 N.J. 369, 390, 204 A.2d 841, 852-53 (1964).